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Nos. 05-1603

Supreme Court, U.S.
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In The
Supreme Court of the United States

G.K. LTD. TRAVEL, W. H. GILLISON, KATHLEEN KUSUDO and RAMSAY SIGNS, INC.,

Petitioners,

v.

CITY OF LAKE OSWEGO and SANDY INGALLS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners present compelling reasons to grant the Petition when some of the issues presented to the Supreme Court were not pleaded to the district court or were not preserved for decision.

2. Whether the Petition should be denied because Petitioners do not accurately state the record of the case.

3. Whether Petitioners present compelling reasons to grant the Petition where there is no split of authority among the circuit courts of appeal on the relevant legal tests applied in the decision under review.

4. Whether the Petitioners present compelling reasons to grant the Petition when the case under review does not conflict with a decision of this Court or decide an important issue of federal law that has not been settled by this Court.

TABLE OF CONTENTS

	Page
SUMMARY OF REASONS TO DENY THE PETITION	1
STATEMENT OF THE CASE	3
I. Introduction	3
II. Nature of the Asserted Claims	3
III. Disposition of Claims in the Proceedings Below	5
IV. Petitioners Distort the Facts	8
REASONS FOR DENYING THE PETITION	11
I. There is No Split of Opinions within the Ninth Circuit or Among the Circuit Courts on the Questions Presented	11
II. The Circuit Court Decision Was Correct	14
A. The Court of Appeals Did Not Create a "De Minimis" Exception to the First Amendment	14
B. The Limitation on Pole Signs Advances Substantial Governmental Interests	16
C. An Administrative Permitting Process is Appropriate	19
D. The Design Review Criteria Are Not Unconstitutionally Vague	20
E. There Are No Jury Questions	21
F. Conclusions	23
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Ackerley Communications of the Northwest v. Krochalis, 108 F.3d 1095 (9th Cir. 1997) 13

Brazos Valley Coal. for Life, Inc. v. City of Bryan, Texas, 421 F.3d 314 (5th Cir. 2005) 12

City of Ladue v. Gilleo, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) 11, 17

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) 18

Don's Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051 (11th Cir. 1987) 13

Edenfield v. Fane, 507 U.S. 761, 113 S. Ct. 1729, 123 L. Ed. 2d 543 (1993) 18

Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) 12

Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965) 13, 19

G.K. Ltd. Travel v. City of Lake Oswego, 436 F.2d 1064 (9th Cir. 2006) ..... *passim*

G.K. Ltd. Travel v. City of Lake Oswego, 2004 WL 817142 (D. Or. 2004) 5, 7

Granite State Outdoor v. City of St. Petersburg, 348 F.3d 1278 (11th Cir. 2004) 13

Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) 20

Harnish v. Manatee County, 783 F.2d 1535 (11th Cir. 1986) 12

TABLE OF AUTHORITIES – Continued

Page

Hill v. Colorado, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) 12, 15

Lindsay v. City of San Antonio, 821 F.2d 1103 (5th Cir. 1987) 12, 13

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001) 12, 17

Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) 12

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) 13, 17

Nat'l Adver. v. City of Orange, 861 F.2d 246 (9th Cir. 1988) 16

Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) 19

Prime Media, Inc. v. City of Brentwood, 398 F.3d 814 (6th Cir. 2005) 12

Southern Oregon Barter Fair v. Jackson County, Oregon, 372 F.3d 1128 (9th Cir. 2004) 13

Thomas v. Chicago Park District, 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002) 13, 19, 20

Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) 11, 14, 15

Utah Animal Rights Coal. v. Salt Lake City Corp., 371 F.3d 1248 (10th Cir. 2004) 13

Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) 7, 16, 17, 20

TABLE OF AUTHORITIES – Continued

Page

RULES

Lake Oswego Code 47.03.005-47.12.500 3

Lake Oswego Code 47.03.010 ..... 18, 22

Lake Oswego Code 47.04.105 19

Lake Oswego Code 47.06.200(4) 20

Supreme Court Rule 10(a) 13

Supreme Court Rule 10(c) 23

SUMMARY OF REASONS TO DENY THE PETITION

1. Petitioners seek review on issues that were not presented or preserved before the district court. Petitioners did not plead that the City censored speech in the way that it reviewed sign permit applications, or that the City's purpose was to suppress speech. Petitioners ultimately sought a jury trial only on its claims about the application of the pole sign limitation. They cannot now complain about the loss of a jury trial for other claims. Petitioners did not contest Respondents' arguments on various claims for relief in the summary judgment proceedings, and cannot revive that contest in the Supreme Court. Thus, some of the issues presented for review would not be properly before the Court if certiorari were granted.

2. The Petition does not present the issues accurately or with clarity. Petitioners contend that the sign code's limitation on pole signs and the required review of signs' appearance was not shown to advance community aesthetics and traffic safety goals. But Petitioners misstate the legislative history and record of the hearings on those requirements. Petitioners state facts that are not supported by the record of the case and are simply not true. Sorting fact from fiction, and truth from exaggeration, is not an efficient use of this Court's time.

3. There is no split of authority among the circuit courts of appeal on the legal tests used to assess the constitutionality of sign codes. The decision under review correctly states those tests. Petitioners disagree with the application of settled law to their claims. Petitioners' dissatisfaction is not a compelling reason to grant review.

4. The text of the sign code at issue is unique to the City of Lake Oswego. A Supreme Court determination about the wording of Lake Oswego's code would be of value only to the litigants. That value is not a compelling reason to grant the Petition. In any event, the decision of the court of appeals is correct. Lake Oswego's restrictions on sign structures and review of the appearance of signs apply without regard to the message on a sign and do not need to be justified by a compelling interest. There was a sufficient basis for the City's conclusion that the challenged parts of the law advance its interests in community aesthetics and traffic safety. Supreme Court precedent does not impose greater procedural requirements for the permitting decisions here because the regulated signs are posted on private land. The sign permit standards are precise enough to provide guidance to applicants, control official discretion, and allow meaningful judicial review. There are no issues of fact that preclude entry of summary judgment on the legal sufficiency of those standards.

STATEMENT OF THE CASE

I. Introduction.

Petitioners present a different case to this Court than the one before the courts below. Petitioners claim that jury issues exist as to the design review provisions of the sign code. Yet, Petitioners did not seek damages or a jury trial on those parts of the sign code. Petitioners seek review because they claim that the ordinance is vague and violates constitutional standards for regulations of the time, place and manner of speech conduct. Yet, Petitioners failed to contest Respondents' summary judgment motion on those claims. Petitioners assert that issues of fact precluded summary judgment on claims about the pole sign limitation. Yet, Petitioners sought summary judgment on those same claims.

II. Nature of the Asserted Claims.

Petitioners misstate the nature of their original claims. The preserved issues on appeal are narrower than stated in the Petition. Petitioners initially attacked the legal sufficiency of dozens of provisions in the sign code, Lake Oswego Code (LOC) 47.03.005-47.12.500; E-1 to E-46.[1] In their arguments on appeal, however, Petitioners focus upon the parts of the code that preclude pole signs in most instances and require substitution of a monument or wall sign for Petitioners' existing pole sign and the provision that sets out design standards for signs. Petitioners

[1] "ER" refers to the excerpt of record filed with the circuit court. The letter references are to appendices to the petition for writ of certiorari.

did not plead or preserve the asserted issues on the design standards provision.

The amended complaint pleaded 17 claims for relief. ER 411 to 433; F-1 to F-32. Petitioner sought damages and a jury trial on four "as applied" claims: the first claim for relief (application of regulations to prohibit commercial speech on petitioners' pole sign); fourth claim for relief (application of regulations to ban pole sign as a protected medium of speech); fifth claim for relief (racial discrimination in enforcement of sign code); and, the sixth claim for relief (just compensation for removal of the pole sign).

The second and third claims for relief sought declaratory and injunctive relief because of the alleged unconstitutional application of the City's pole sign regulations to Petitioners. In the remaining 11 claims for relief, Petitioners sought declaratory and injunctive relief on the text of the sign code. They pleaded that various parts of the sign code were "facially unconstitutional" because the text of the ordinance purportedly regulated on the basis of sign content or speaker viewpoint, imposed unreasonable limitations on signs, preferred commercial speech, contained insufficient procedural safeguards, granted too broad of discretion to decision makers, improperly classified, and were overbroad and vague. *Id.*

Petitioners withdrew the fifth claim for relief (race discrimination), the sixth claim for relief (just compensation for taking) and the seventh claim for relief (improper amortization of signs). ER 223 to 246 (submitted pretrial order).[2] Thus, the only pleaded jury claims pertained to the

[2] After a change of counsel, Petitioners later disputed that they authorized the lodged pretrial order. Petitioners separately asked that

(Continued on following page)

application of the City's restrictions on pole signs. The remaining claims, including the claims based on the design review provisions of the ordinance, sought judicial relief based solely upon the text of the ordinance.

Put another way, Petitioners did not plead that the constitutional difficulty with the design review provisions of the ordinance arose because of the manner of their application or because the City harbored an intent to censor or restrict speech, issues that they now assert require jury resolution. Rather, the fourteenth claim for relief was based solely on the text of this part of the ordinance. It asserted that a First Amendment violation existed because of a "facially unconstitutional grant of overly broad discretion," that "sections of the Sign Code place unbridled discretion in the hands of government officials." ER 429 to 430; F-26 to F-27.

Petitioners' theory on appeal and before this Court – that jury issues exist on the constitutionality of the design review provision – differs from the way the claims were pleaded and prosecuted in the summary judgment proceedings. The issues raised in Petitioners' fifth reason for review were not preserved.

III. Disposition of Claims in the Proceedings Below.

Petitioners' failure to contest particular summary judgment motions made by the City precludes some of the

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the race discrimination claim be dismissed. The takings claims, the sixth and seventh claims for relief, were found to be premature by the district court and those rulings were not appealed. *G.K. Ltd. Travel v. City of Lake Oswego*, 2004 WL 817142 (D. Or. 2004), Opinion, pp. 26-28; ER 367 to 369; B-30 to B-32.

assertions made to this Court. After withdrawing the fifth, sixth and seventh claims for relief, Petitioners sought summary judgment on 11 of the 14 remaining claims, representing that no material issues of fact prevented entry of judgment. ER 459 to 461. In particular, Petitioners sought summary judgment on the two surviving damage claims, the first and fourth claims for relief, relating to the application of the pole sign limitation. Petitioners only assert that their claims present jury questions after having lost their motions below. Petitioners also sought summary adjudication on the thirteenth claim for relief (insufficient procedural safeguards) and the fourteenth claim for relief (unbridled discretion) relating to the design review provisions.

Respondents sought summary judgment on all of the claims. ER 462 to 465 (defendants' motion for summary judgment). Respondents presented legal arguments on the eleventh claim for relief (facially unreasonable time, place or manner regulations) (ER 492 to 493), and the sixteenth and seventeenth claims for relief (overbreadth and vagueness) (ER 494 to 500). Petitioners did not respond to those arguments. ER 600 to 608.

The district court granted summary judgment to Respondents on these three claims for relief because of Petitioners' failure to respond to Respondents' legal assertions. With respect to the eleventh claim for relief, Judge King held that,

> Based on how plaintiffs pleaded their eleventh claim, defendants address Sections 47.12.500 and 47.04.115 in their memorandum in support of their motion for summary judgment and explain why they meet constitutional standards or argue that such standards are inapplicable.

> Plaintiffs, however, never refute those arguments. This fact, combined with my earlier review of the constitutionality of these content-neutral provisions, lead me to grant summary judgment in defendants' favor on plaintiffs' eleventh claim for relief.

G.K. Ltd. Travel v. City of Lake Oswego, 2004 WL 817142 (D. Or. 2004), Opinion, p. 24; ER 365; B-27.

The vagueness and overbreadth claims were similarly dispatched. The court determined that,

> . . . Defendants move against [the 16th and 17th claims for relief] and take pains to address the numerous enumerated sections of the Sign Code that plaintiffs allege are unconstitutionally vague.
>
> Again, plaintiffs do not respond to defendants' arguments. . . . Summary judgment is granted against plaintiffs' sixteenth and seventeenth claims for relief.

Id., Opinion, p. 24; ER 365; B-28.

Petitioners' claim that certain portions of the sign code violate the constitutional standards for time, place and manner restrictions on speech (reason for review two) or are unconstitutionally vague (reason for review four) were abandoned in the district court proceedings and were not preserved.[3] Moreover, to whatever extent Petitioners

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[3] The application of *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (stating the constitutional tests for a speech regulation not based on the content of the speech) to the pole sign limitation was raised and preserved in the proceedings below.

assert that jury questions exist on the first and fourth claims for relief (reason for review five), those contentions are inconsistent with their own motion for summary adjudication, and representations that no material issue of fact exists on those claims.

IV. Petitioners Distort the Facts.

The Petition should be denied because it distorts the facts and makes assertions not supported in the record. Petitioners claim that the sign code was adopted and reconsidered without "any research" or review of "any studies" on whether the regulations would advance the stated purposes in the ordinance. Petition, p. 2. According to Petitioners, the testimony of citizens "was ignored." Petition, p. 22. What resulted, under Petitioners' version of the facts, was a sign code that contains "regulations of on-premises signs" (Petition, p. 5), a code that regulates signs on the basis of the content of the message on the sign or the viewpoint of the speaker, and one that has permitted the City to "impose subjective conditions for approval of the . . . message and copy" of signs (Petition, p. 4). These assertions are false.

In truth, the sign code was adopted with substantial citizen involvement in its initial adoption in 1985, in its revision in 1994 as well as in reconsideration of the pole sign limitations and design review process in 1999, 2000 and 2004. The business community was substantially involved in the 1985 enactment. ER 190, 196. The 1985 enactment was intended to remove all content-based distinctions in the code, although it was not entirely successful in this effort. ER 170.

The 1994 changes were based, in part, on the City's comprehensive land use plan and its policies on community aesthetics. ER 526. The 1994 changes were intended to further remove subject matter distinctions from its classifications, making the code consistent with evolving state and federal free speech constitutional protections. ER 526 to 527, 529 to 530, 534 to 537, 538. The 1994 revision resulted from two workshops and three public hearings before the planning commission (ER 529), review and suggested changes by a number of business groups (ER 529 to 530), and city council study sessions and hearings (ER 534 to 539). There was a factual record on signs around the community and the country, visual clutter, signage in the rights of way, time restrictions on temporary signs, the need for "fair competition" in signage, sign size and aesthetic concerns, among other issues. *Id.* There was significant testimony on community aesthetics and business needs. ER 187 to 191.

The needs for the pole sign limitation and design review provisions were revisited by the planning commission and city council in 1999 and 2000 hearings and work sessions. ER 173, 547 to 585. In the spring of 2000, the planning commission and development review commission held a joint hearing on whether the pole sign limitation and design review provisions should be changed. Despite notice of the hearing to over 50 sign companies and a number of business groups, only one person testified. The commissions recommended that no change be made. ER 574 to 578. Further hearings were held by the city council in July, 2000. ER 583 to 587. The time for complying with the pole sign restrictions was extended to 2004. A deputized councilor met with business representatives (including Petitioner G.K. Travel's predecessor) to see if

standardizing sign requirements was preferable over design review. There was only "lukewarm support" for the idea and it was not pursued. ER 588 to 589.

Respondents belabor this history to refute Petitioners' factual contentions that the limitations were based on whim and lacked record support. In this case the limitation on pole signs and imposition of design review controls on the appearance of signs resulted from community plans, citizen testimony and professional advice, and those controls were recalibrated and assessed a number of times after their enactment.

In truth, the City's sign code does not regulate on the basis of whether a sign is "on-premises" (i.e., whether its message pertains to a proximate business or activity) or "off-premises." Petitioners' repeated references to the regulation of "on-premises signs" are without foundation. Petition, pp. 5, 6, 10, and 18.

In truth, the sign code does not classify signs on the basis of their message (with the few exceptions found by the district court). The circuit court and the district court found that the code otherwise did not regulate the content or perspective of a sign message. The circuit court did not excuse a content based regulation because it was "di minimus (sic)." Petition, p. 8. The words "de minimis" are not in the opinion. Instead, the court found that there were no regulations of the substantive content of sign copy.

Finally, in truth, the City does not impose conditions on sign permits requiring approval of the content or message of the sign. In fact, Petitioners requested and reviewed all of the City's sign permits, temporary sign permits, permit applications, citations and municipal court and administrative proceedings on sign code enforcement

between 1990 and 2003. ER 442 to 458. Petitioners failed to uncover any censorship or attempts by the City to use the sign code to prevent any subject matter of speech.

REASONS FOR DENYING THE PETITION

I. There is No Split of Opinions within the Ninth Circuit or Among the Circuit Courts on the Questions Presented.

The law that applies to the issues stated in the Petition is settled. There is no reason to grant review in order to resolve conflicting cases within the Ninth Circuit Court of Appeals or among the other Circuit Courts of Appeals. Petitioners do not point to any difference of opinion within the Ninth Circuit or among the Circuit Courts of Appeals as to the legal tests applicable to Petitioners' assertion.

Contrary to Petitioners' assertion, the opinion under review does not announce "new changes in standards for regulating on-premises signs" (Petition, p. 6). The opinion applies *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 643, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) which identified content or viewpoint-based sign regulations as those that regulate the message of a sign (as opposed to policies affecting the sign structure, its physical dimensions or its placement in different zoning districts).

As this Court noted in *City of Ladue v. Gilleo*, 512 U.S. 43, 48, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994), "[i]t is common ground that governments may regulate the physical characteristics of signs. . . ." Review is not needed to assess whether the City of Lake Oswego can regulate the type of structures supporting a sign, precluding taller, pole signs in favor of monument, ground-mounted signs or

wall signs – or to ask whether the City can regulate the appearance of signs. There are numerous decisions upholding regulations on the physical characteristics or location of signs. *See, e.g., Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (ban on attaching signs to public property); *Brazos Valley Coal. for Life, Inc. v. City of Bryan, Texas,* 421 F.3d 314 (5th Cir. 2005) (restrictions on signs in rights-of-way); *Prime Media, Inc. v. City of Brentwood,* 398 F.3d 814 (6th Cir. 2005) (size and height restrictions); *Lindsay v. City of San Antonio,* 821 F.2d 1103 (5th Cir. 1987) (ban on portable signs); *Harnish v. Manatee County,* 783 F.2d 1535 (11th Cir. 1986) (ban on portable signs and changeable-copy temporary signs).

Likewise, it is plain that content-neutral sign regulations are not subject to strict scrutiny review simply because the sign must be viewed to apply the law (e.g., regulations on the appearance or illumination of signs). This Court held in *Hill v. Colorado,* 530 U.S. 703, 721, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) that it can be proper "to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." The decision under review applied that holding to conclude that regulation of the appearance of signs is not a content-based regulation of speech. Petitioners cite no authority to the contrary.

Federal cases consistently hold that regulations of speech can be justified by "history, consensus and 'simple common sense,'" the test articulated in *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 555, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001) and *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 628, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995), and applied by the Court of Appeals in the case at

bar. Moreover, with respect to signs, deference is given to the legislative judgment that the regulation of the appearance or location of signs advances community interests in aesthetics and traffic safety. *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 509-510, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981) (plurality opinion); *Ackerley Communications of the Northwest v. Krochalis,* 108 F.3d 1095, 1098 (9th Cir. 1997); *Lindsay,* 821 F.2d 1103; *Don's Porta Signs, Inc. v. City of Clearwater,* 829 F.2d 1051, 1053 (11th Cir. 1987). Petitioners cite nothing to the contrary and review is not warranted to corroborate this principle of law.

Finally, the circuit courts uniformly apply *Thomas v. Chicago Park District,* 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002) more broadly than Petitioners desire. *Thomas* relaxed the procedural requirements for a prior restraint of speech set out in *Freedman v. Maryland,* 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965) for content-neutral speech regulations. Petitioners wish to narrow *Thomas* to require the *Freedman* procedures when speech occurs on private land. The circuit courts make no such distinction. *Granite State Outdoor v. City of St. Petersburg,* 348 F.3d 1278 (11th Cir. 2004); *Utah Animal Rights Coal. v. Salt Lake City Corp.,* 371 F.3d 1248 (10th Cir. 2004); *Southern Oregon Barter Fair v. Jackson County, Oregon,* 372 F.3d 1128 (9th Cir. 2004). Review is not necessary to clarify *Thomas.*

There are no reasons to grant review in order to clarify the law or because the decision is in conflict with another court of appeals decision on an important matter. Supreme Court Rule 10(a).

II. The Circuit Court Decision Was Correct.

A. The Court of Appeals Did Not Create a "De Minimis" Exception to the First Amendment.

Petitioners' first reason for review claims that the circuit court erred by applying "essentially, rational basis review to viewpoint based regulations of signs on the belief that exemption from the requirements of obtaining a permit and going through design review has only 'incidental effects' upon speech." Petition, p. 8. Petitioners assert that this "new 'di minimus' [sic] exception to strict scrutiny" threatens First Amendment jurisprudence. *Id.* The circuit court opinion creates no such distinction. Petitioners' real disagreement with the decision is with its application of settled Supreme Court case law to conclude that no content or viewpoint distinctions are made in the ordinance.

In the proceedings below, Petitioners claimed that the sign code classified on the basis of the content of signs or viewpoints expressed in the signs' message because the code precluded most pole signs after an amortization period, because the visual characteristics of a sign must be ascertained to see if a change of copy regulation applies, and because the code classified on the basis of sign location, use of the property where the sign was displayed, or generic identity of the property user (such as distinguishing between signs in commercial zones as opposed to residential zones).

In rejecting these contentions, the circuit court relied on established Supreme Court precedents. The court quoted *Turner Broadcasting*, 512 U.S. at 643, to hold that, on its face, the pole sign regulation does not "distinguishes

favored speech from disfavored speech on the basis of the ideas or views expressed." *G.K. Ltd. Travel v. City of Lake Oswego,* 436 F.2d 1064, 1071 (9th Cir. 2006). The pole sign limitation did not create exceptions for preferred content. *Id.*

The Ninth Circuit later quoted *Turner* for the proposition that "[l]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id.* at 1077, citing *Turner Broadcasting,* 512 U.S. at 658. But it held that the exemptions from the permitting requirements for publicly owned signs in the rights of way, hospital signs and railroad signs "say nothing of the City's preference for the content of these speakers' messages, nor do they allow the City to discriminate against disfavored speech." *Id.* This holding is correct and a plain application of *Turner.*

Finally, the Court of Appeals rejected Petitioners' argument that reviewing the appearance of a sign to see if a change of copy occurred is a content-based regulation simply because the sign has to be viewed to apply the ordinance. The court relied on the holding in *Hill v. Colorado,* 530 U.S. at 721, that, "[w]e have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Id.* at p. 1079. In arguing that this application of *Hill* is incorrect, Petitioners do not even quote or analyze the precedent.

Instead, Petitioners appear to claim that the court tolerated a limited number of content-based exceptions from the permitting requirements, and created a "di minimus" exception from the general strict scrutiny test. The decision did no such thing. The district court severed

very few subject matter exceptions to the permitting requirement from the remaining parts of the law, and that determination was not appealed. The circuit court found that none of the other exceptions to the requirement to obtain a sign permit were based on the content of the sign's message. It did not state that constitutional justification for speech content regulations can be avoided. Indeed, the Ninth Circuit has overturned a sign code because of subject-matter distinctions in the classes of signs exempt from permitting requirements. *Nat'l Adver. v. City of Orange,* 861 F.2d 246 (9th Cir. 1988). The *G.K. Ltd. Travel* case does no violence to this principle.

B. The Limitation on Pole Signs Advances Substantial Governmental Interests.

In arguing for their second reason for review, Petitioners quibble with the Ninth Circuit's application of *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) to the City's phase-out of pole signs, in favor of ground-mounted and wall signs of the same dimensions. Petitioners assert that there was conflicting evidence on whether the ordained purposes of the sign code matched the true intent of the city council; they argue that the "personal aesthetic values of officials" is not a significant governmental interest and that there was no proof that the sign structure regulation would advance community aesthetics or traffic safety. Petition, pp. 9-14.

Again, Petitioners do not complain that the circuit court misstates the law. They only claim that the Court of Appeals was insensitive to their arguments about the

application of *Ward*. The court rejected Petitioners' arguments because they were wrong.

Regulations of the physical characteristics of signs are nearly always sustained by the courts. The constitutional rationale is neither novel nor complex. As stated by this Court in *City of Ladue*, 512 U.S. at 48, "[i]t is common ground that governments may regulate the physical characteristics of signs – just as they can, with reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise."

This Court has identified the types of evidence that can be relied upon to show pole sign limitations advance the purposes of the sign code. That test, which was quoted and applied by the circuit court, was set out in *Lorillard Tobacco*, 533 U.S. at 555 ("We have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'") Petitioners do not apply the *Lorillard Tobacco* test in their Petition.

The city council concluded that monument and wall signs better advance community aesthetics and the pedestrian orientation of the city's business districts, than tall pole signs. That judgment was based upon testimony and evidence received at hearings. Contrary to Petitioners' assertions, this Court and other courts defer to this type of legislative judgment in the regulation of signs or the manner of speech. *See, Metromedia*, 453 U.S. at 509-510 ("We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and

substantial hazards to traffic safety. . . . We reach a similar result with respect to the second asserted justification for the – advancement of the city's esthetic interests."); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 299, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) and cases cited above at p. 10.

The justification is more demanding when the regulation is on the content of speech. *Edenfield v. Fane,* 507 U.S. 761, 113 S. Ct. 1729, 123 L. Ed. 2d 543 (1993) (ban on solicitation by public accountants). That is not the case here. The Court of Appeals was correct in deferring to the means-ends judgment of the city council, and alternatively concluding that the pole sign restriction "was the result of much legislative deliberation, a dynamic dialogue with the City's residents and businesses and hearings . . . [and] the experience of other cities. . . . This evidence provided the City with legitimate and relevant bases for advancing its Sign Code and restricting the availability of pole signs." *G.K. Ltd. Travel,* 436 F.3d at 1073.[4]

[4] Respondents dispute that there was conflicting evidence that the ordained purposes of the sign code (LOC 47.03.010) were not the purposes of the legislative body adopting the code (Petition, p. 9), that this is the first circuit court case upholding the regulation of signage based on aesthetic interests (Petition, pp. 9-10), that the only evidence in the legislative history of the sign code on aesthetics was "comments of a few officials" (Petition, p. 13), that the distaste for pole signs was not shared by "anyone outside the city planning department" (Petition, p. 13), that the pole sign limitation does not apply to "messages by certain speakers that city officials like" (Petition, p. 13), and that the record, current research or common sense shows that taller signs are more safe (Petition, p. 14).

C. An Administrative Permitting Process is Appropriate.

Petitioners' third reason for review claims that the circuit court erred in not confining the application of *Thomas v. Chicago Park District*, 534 U.S. 316, to activities on public land. *Thomas* narrowed the requirements for a prior restraint of speech stated in *Freedman v. Maryland*, 380 U.S. 51, (limiting restraint to a short period of time with swift and full recourse to judicial review). *Thomas* held that when a speech licensing regulation is a content-neutral time, place and manner regulation of the use of a public forum, the procedural safeguards of *Freedman* do not apply.

As noted earlier, cases apply *Thomas* to speech activity in private and public fora. Generally, content-neutral sign regulations need not contain the *Freedman* protections. Moreover, even if *Thomas* is confined to speech in a public forum, the code at issue restricts signs visible from public ways, consequences measured in a public forum. LOC 47.04.105 (exempt signs); E-15. Finally, it does not make any sense, as suggested by Petitioners, that there be a greater justification or more procedural restrictions for regulating speech on private land than in a public forum. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n,* 460 U.S. 37, 46, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (lower burden to justify regulation of speech on private land, in a non-public forum).

The Court of Appeals did not err in applying *Thomas*.

D. The Design Review Criteria Are Not Unconstitutionally Vague.

Petitioners state that the Court of Appeals erred in concluding that the criteria for issuing a sign permit are not unconstitutionally vague. LOC 47.06.200(4) requires that,

> Signs shall be designed to be compatible with other nearby signs, other elements of street and site furniture and with adjacent structures. Compatibility shall be determined by relationships of the elements of form, proportion, scale, color, materials, surface treatment, overall sign size and the size and style of lettering.

E-18.

The Court of Appeals found that subjectivity alone did not render the sign code unconstitutionally vague. *G.K. Ltd. Travel*, 436 F.3d at 1085.[5] Relying upon *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), the court held that mathematical certainty was not required, that the criteria for determining compatibility were sufficiently precise, and that issues of compatibility were difficult to define in completely objective terms. *Id.* at 1085.

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[5] The court earlier found, in a related argument about "unbridled discretion," that the compatibility standards were specific and had not been used to censor speech. The court relied upon *Thomas* and *Ward* to require that permitting standards be "reasonably specific" and not precluded because they are "flexible." Petitioners do not address these precedents. *G.K. Ltd. Travel v. City of Lake Oswego, supra*, at pp. 1083-1084.

As noted above, Petitioners failed to contest Respondents' legal assertions about the vagueness of the ordinance; the district court found that Petitioners did not preserve this claim. The Due Process issue of vagueness (raised in the seventeenth claim for relief) is different than the First Amendment "unbridled discretion" claim (pleaded in the fourteenth claim for relief), despite Petitioners conflating the two. *See,* Amended Complaint, pp. F-26-27, F-30. Thus, to reach the issue of vagueness, this Court would need to first overturn the district court's determination of failure to contest.

Moreover, even if preserved, the Court of Appeals was correct that the 14th Amendment does not require that laws be written only in objective terms. Petitioners cite no precedent to this effect, only cases that state an intolerance for laws with such a high degree of subjectivity that the meaning must be guessed, where the laws pose a significant risk of arbitrary application. Those circumstances are not present here.[6]

E. There Are No Jury Questions.

Petitioners' last reason for review is that the grant of summary judgment to Respondents robbed Petitioners of their constitutional right to a trial by jury, in that there were conflicting issues of fact for jury resolution. Petitioners state that there are "[t]hree seminal, genuine issues of material fact," as follows: "whether the city's purposes are real and are constitutional; whether the city delegates

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[6] Petitioners' recitation of evidence presented in a subsequent municipal court enforcement proceeding is improper and disputed. Petition, pp. 17-18.

unbridled discretion to its employees by allowing them to rely upon subjective criteria in deciding whether to issue a sign permit; and whether the standards of the Sign Code's design review clause applied in the permitting process are unconstitutionally vague. . . ." Petition, p. 21. Petitioners later inconsistently argue that the design review criteria are unconstitutionally vague "as a matter of law." Petition, p. 29.

First, as noted above, Petitioners have no right to a jury trial on the claims related to the design review section of the sign code. Those claims seek declaratory and injunctive relief based upon the text of the law, not its application to Petitioners. The only jury claims, the only claims for damages based on the application of the sign code, concern the part of the code limiting pole signs after May, 2004 (first and fourth claims for relief). So the purposes of the design review provision and the subjectivity or vagueness of its standards are not jury questions.

Second, there are no fact questions about the purposes of the sign code. They are stated in LOC 47.03.010. The preservation of the City's aesthetic quality and the protection of traffic safety are, in the words of the Court of Appeals, "oft-invoked objectives with a rich history of judicial enforcement." *G.K. Ltd. Travel*, 436 F.3d at 1072. It is completely irrelevant that these purposes are not standards for permitting decisions under the code as trumpeted by Petitioners. Petition, p. 25. The fact that LOC 47.03.010 is not used in making administrative decisions in 2004 does not create an issue of fact about the legislative purposes in enacting the sign code policies in 1994.

Third, Petitioners only pleaded claims about whether the text of the code was impermissibly vague or conferred too much discretion to administrative decision makers. These are issues of law, not issues of fact, on which summary judgment was proper.

Finally, this is not an appropriate case to develop the law of summary judgment. Petitioners themselves sought summary judgment on claims that they now argue are inappropriate for summary adjudication (the first and fourth claims for relief).[7]

F. Conclusions.

The decision under review breaks no new ground. It does not decide an important question or federal law that has not been, but should be, settled by the Supreme Court. The holdings in the decision are consistent with the relevant decisions of this Court. Supreme Court Rule 10(c). Petitioners merely disagree with the application of settled law to their claims.

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[7] Respondents also dispute the factual accuracy of Petitioners' assertions that the "the input that citizens provided was ignored" (Petition, p. 22), that the "city produced little evidence of its legislative history between the 1994 and 2000 revisions" (Petition, p. 23), that consideration of changes to the design review provisions was "permanently tabled" in 1999 (Petition, p. 24), that there is a "75% reduction in visibility" caused by lowering signs (Petition, p. 25), that eliminating classifications based on the content of signs is inconsistent with the code's stated purposes (Petition, pp. 25-26), and that the stated purposes of the sign code are "not discussed in any city records" (Petition, p. 26). Respondents cannot respond to Petitioners' claim that a New Hampshire trial court is confused without a citation to a judicial opinion.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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